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Before the
Supreme Court of the United States
OCTOBER TERM, 1941

No. 143

THE BOARD OF TRADE OF KANSAS CITY, MO., J. F. LEAHY, R. E. SWENSON, G. A. JOHNSON, ET AL.,
Appellants,

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

TEXAS INTERVENERS' REPLY BRIEF ON BEHALF OF APPELLEES

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WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas, Texas — Central-4091

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I. FOREWORD

This reply brief is filed for and on behalf of the Texas Industrial Traffic League, Fort Worth Grain and Cotton Exchange and the Tex-O-Kan Flour Mills Company, which intervened in the trial court on behalf of appellees.

We shall deal with statements appearing in appellants' brief by referring to particular subjects discussed on pages indicated. The page numbers indicate the pages of appel-

lants' brief on which appear the statements hereinafter replied to.

II. STATEMENT OF THE CASE

(a) Nature of the Suit (P. 2)

Appellants approach this case with the statement that the orders under attack require the so-called primary markets to *pay substantially higher charges* for the privilege of stopping grain in transit than are paid by other shippers for the same service. That statement is erroneous. Individual instances of variance may be found but, in the aggregate, the primary markets do not pay more for that service than other shippers pay.

The orders in question provide a method of determining transit balances at the so-called "primary" markets different from that generally used, this different method having been prescribed at the request of the primary markets. Generally speaking, the transit balance applicable to outbound shipments of grain is determined by deducting the amount paid on the inbound tonnage from the through rate applicable from origin to final destination via the transit point. Such balances vary, depending on the through rates applicable and the amounts paid in to the transit point. The primary markets objected to these varying balances and the Commission at their request determined what the average of these balances would be and prescribed a fixed transit balance known as a "proportional rate" which represents the average of transit balances on all grain handled through the primary market to a given destination.

The use of the fixed transit balance representing the average of all transit balances does not result in primary

markets paying "*substantially higher charges*" than they would pay if they used the actual transit balances determined in the same manner generally used throughout the United States.

Appellants' Exhibit 9 sets forth certain picked examples selected for the purpose of showing the court that the rate-break markets have to pay substantially higher rates on grain transited at such rate-break markets than are paid by interior transit points on the routes passing through the rate-break markets, but they do not present a complete picture of the situation or a true picture as to the tonnage involved. As an example, it is argued (P. 22) that tonnage moving from San Antonio, Texas, to St. Louis, Mo., transited at Kansas City, is subject to a higher rate than when such tonnage is transited at Wichita, Topeka and other points on the indirect route passing through Kansas City. This argument ignores the fact that, as a practical matter, San Antonio transit billing is never used on grain moving under transit from Kansas City to St. Louis because there is plenty of grain throughout the Western District which is avaliable for transit at Kansas City and re-shipment to St. Louis and beyond on which Kansas City enjoys the lowest rate available to any other transit point. Furthermore, San Antonio tonnage may be transited at Kansas City and moved north to Chicago, Omaha, Minneapolis and numerous other points at the lowest rate available to any other transit point.

The illustrations shown in appellants' Exhibit 9 and discussed in brief are paper illustrations which do not arise in actual transit practice and they do not result in any damage to or discrimination against appellants. That is

why the Interstate Commerce Commission found as a fact that the present adjustment of rates does not subject the rate-break markets to undue prejudice and disadvantage.

(b) Commission Reverses Previous Rulings (P. 16)

Appellant is in error in making the following statement on page 17:

> "While the Commission said that there must be a substantial difference in conditions, it found no difference in transportation services and found that the mechanics of transit under the rate-break and under the through rates were exactly the same."

The Commission found (215 I. C. C. 91, R. 539) that there is a substantial difference in the transportation conditions involved in the "proportional system" of transit at rate-break markets and the "transit balance" system used at other points:

Circuity: Under the transit balance system, transit is "usually confined to points situated on reasonably direct routes." If the shipment moves via a circuitous route, an out-of-line charge is made. Under the proportional system, unlimited circuity without extra charge is permitted.

Participation: Under the transit balance system, outbound shipments from the transit point are confined to the rails of the inbound carrier and its connections participating in the through rate. Under the proportional system, outbound shipments may move from rate-break markets via any line without restriction as to routes.

> "Through rates less than the combinations of locals on the rate-break markets are therefore available to transit operators at those markets on all shipments to all destinations to which the proportional rates are

published, from all origins, and over all routes through those markets, no matter how circuitous." *Grain and Grain Products Within the Western District and for Export*, 215 I. C. C. 91. (R. 539.)

Appellant erred in stating on page 17 that the advantages existing at rate-break markets "are due entirely to the location and facilities of such markets." They are due in large part to the prescription by the Interstate Commerce Commission of the "proportional system" of transit which is permitted by the Commission only at rate-break markets. Certain markets which are just as well located and which have just as good facilities as some of the rate-break markets do not enjoy either the rate-break or the proportional system of transit because the Commission refused to prescribe those methods of making rates and determining transit balances except at the points indicated in appellants' brief.

(c) Direct and Indirect Routes (P. 18)

Generally speaking, when the rate-break markets are on the direct route the tariffs never provide for higher transit balances from the rate-break markets than apply from other transit points. The rate-break markets are on indirect routes in every instance depicted on Plates I to V, inclusive. (R. 723-728.)

So far as we are aware, the record does not show any instance where a rate-break market located on a direct route, the shortest route available between origin and final destination, pays a rate higher than the rates applicable via other transit points. If there be such an instance, it is the exception, not the general rule.

The example cited on page 19 of appellants' brief is a case where the route through Kansas City is an "indirect route." The short route is via the Wabash Railway (Plate III, shown as page 5 of brief). If the rate-break markets were located on the "direct route," the rate disparity depicted on page 19 of brief would not exist.

(d) Discrimination Now Existing (P. 20)

Appellants predicate their statement as to discrimination on the erroneous assumption that the primary terminal markets actually "pay substantially higher rates" when transit is taken at terminal markets than when taken at other markets. The maps presented by appellants (R. 723-728) depict tariff situations which they have developed by their experts but there is not one word of testimony in the record showing that the terminal transit operators pay the higher rates referred to on pages 20 to 23 of their brief.

The constant transit balance, otherwise known as a proportional rate, is an average of transit balances from all origins to a given destination. It is lower than the highest transit balance and higher than the lowest transit balance that would be available if the "actual balance" system were employed at the rate-break markets, as it is at other markets.

The price of all grain of a given type and grade reaches a common level at the terminal markets. Shipments of grain or products moving out under transit to Chicago, St. Louis, or any other destination, moves at the constant balance or proportional rate determined by the Commission as the average of all transit balances that would apply under the "actual balance" system. They do not pay any more on

grain originating at San Antonio, Texas, (Plate IV) than they pay on any other grain.

There is no evidence in this record that primary terminal markets "pay substantially higher rates" in the aggregate than any other transit point. They have available plenty of inbound grain which they can transit to St. Louis just as cheaply as any other market can. They can transit San Antonio grain and send it to hundreds of destinations, other than St. Louis, just as cheaply as any other market can.

The disparities pointed out on pages 20 to 23 of appellants' brief are tariff disparities arising from the fact that the rate-break markets named are not on the short direct routes in the instances shown. There is no evidence showing that they actually pay those higher rates. The court should take judicial notice of the fact that they would not pay those rates when they can use other origin grain without penalty to the destinations named.

(e) Difference in Service and Cost (P. 24)

As previously stated, the Commission did find that there is substantially more transportation service available to terminal market operators without additional cost than is available to transit operators using the transit balance system whereby they have to pay the actual outbound balance plus out-of line charges where circuitous hauls are employed. Operators using actual outbound balances also must pay combination of locals if they route shipments via railroads other than the inbound carrier and its participating connections.

III ARGUMENT

(a) Difference in Transit Service or Cost Thereof (P. 39)

Appellant erred in the following statement on page 39 of its brief:

> "Here the transportation services rendered to complainants at terminal markets and to their competitors at other markets are exactly the same."

Transportation services available to operators at the terminal markets are substantially greater than those rendered without additional cost to operators using the actual transit balance system. Under the actual transit balance system, the movement is confined to reasonably direct routes. If moved via circuitous routes, out-of-line charges are usually assessed in addition to the through rate. Outbound shipments may be routed only via the inbound carrier or carriers participating with it in through movements. If not so routed, combinations of locals substantially higher than the through joint rate will be assessed. (215 I. C. C. 91, R. 539.)

If the elevator located at Turner, Kan., referred to at page 39 of appellants' brief, were placed outside the Kansas City switching limits, it would be deprived of the ceiling in outbound balances accorded operators at rate-break markets, such ceiling being the average of all transit balances applicable under the usual transit balance system to a given destination. While it might result in that elevator being able to ship tonnage *originating at certain points* under the usual transit balance system for less than is now available to it, those instances are exceptional and the advantages as to circuitous hauls, unlimited selection of outbound

routes, etc., which it now has and which it would lose by being placed outside the Kansas City switching limits, would far outweigh any benefits it would obtain by such removal.

The cases cited by appellant at pages 42 to 52, inclusive, are not in point because they all deal with situations where the carrier or carriers charged a shipper or locality more for performing a given service than it charged a competing shipper or locality for performing the same or a substantially similar service. The issue involved here is whether or not the Commission has the power, on the request of certain markets, to determine, fix and prescribe an average figure which represents all of the varying transit balances that it would pay on all of the individual shipments going to given destinations. That system of rate making has long been in existence and has been upheld by the courts many times.

> "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switchig rates, is within the competence of the Commission." *Illinois Commerce Commission v. United States*, 54 S. Ct. 783 (788); 292 U. S. 474.

The reasonableness of group rates must be determined, not by considering the rate from the point of origin to a particular station in the group, but rather as applicable to the entire group.

> "It seems desirable and in no way disadvantageous to either the markets or the growers to have points of production that are close to each other and affected by the same elements of competition and transportation conditions grouped under a common rate, and where such grouping is reasonably done the shorter distances to the markets in question *may be determined by the average distances* from the points reached by both sys-

tems within a given group. Where there is but one such point in a group the distances should be computed from that point, and where there is no such point in a group the distances should be computed from a point that is substantially centrally located in the group." Emphasis supplied.) *Superior Commercial Club v. Great Northern Ry. Co.*, 25 I. C. C. 352 (345).

In *Arlington Heights Fruit Exchange v. S. P. Company*, 22 I. C. C. 149, the Commission prescribed rates from the Pacific Coast to a group extending from the Rocky Mountains east. The order of the Commission in that case was sustained by this court. *A. T. & S. F. Railway v. United States*, 231 U. S. 736; 34 S. Ct. 316.

(b) Difference in Conditions Justify Different Treatment (P. 53)

Appellants predicate their argument on two erroneous assumptions:

First, they assume that the prescription of the average of all transit balances as a fixed transit balance, known as a proportional rate, to be applied on all transit shipments to a given point regardless of the origin from which the tonnage moved, results in "higher charges" to the terminal operator than would apply if the actual transit balances were individually determined and paid in each case. That is not correct.

Second, they assume that the only differences found by the Commission are the direct result of natural conditions not affected by orders of the Interstate Commerce Commission or by transportation performed by the carriers. That assumption is not correct because the average or proportional transit system was prescribed at certain market

points. The location of those markets did not create a departure from the usual individual transit balance system. That departure was brought about by the desire of the markets and the orders of the Interstate Commerce Commission.

As pointed out by the Commission, *there is a substantial difference* in the transportation service and routing privileges available under the proportional rate system from those available under the actual transit balance system applicable at other than rate-break market points. The Commission could have prescribed a straight mileage scale of rates to apply via all markets, regardless of their location or size. Due to the pleas of certain markets, it determined reasonable maximum through rates via those markets and broke those rates into component parts so that the outbound balance to any given destination would be the same, regardless of the origin of the grain. By doing so, it made substantially more transportation available to those markets, without extra charge, than is available to other than rate-break markets.

In the orders here under consideration, the Commission did not attempt to equalize natural advantages or deprive any market of the advantage of its location. Averaging the individual transit balances and applying that figure as a constant balance from all points of origin is the application of a principle which the carriers and the Commission have long used in making group rates. It does not offset or equalize the natural advantages possessed by any market or operator.

(c) Grounds Upon Which Commission Dismissed Complaints (P. 83)

Appellants failed to state on page 84 of their brief all of the reasons given by the Commission for its refusal to grant the relief sought. In addition to the reasons set forth on page 84, the Commission said an order granting such relief would:

1. Impose an additional burden upon the carriers in respect of one of their most comprehensive adjustments and important groups of commodities at a time when they were least able to bear it. (229 I. C. C. 15, R. 643.)

2. Make applicable a great number of transit balances lower than the proportional rates out of the rate-break markets on indirect routes. (229 I. C. C. 15, R. 643.)

3. Result in the establishment of one factor rates less than the rate-break combinations over direct routes. (229 I. C. C. 15, R. 643.)

This decision should also be read in the light of previous findings by the Commission showing that the dual system of transit resulted in preferences prohibited by Section 3 of the Interstate Commerce Act. The dual system of transit had been condemned by the Commission upon five previous occasions. (231 I. C. C. 795, R. 650.)

(d) Disruption of Rate Structure by Dual System (P. 85)

Appellants erred in statement on page 91 that the Commission has the power to keep the situation under control and prevent the re-establishment of the unrestricted dual system. The so-called dual system refers to the system of transit in effect at the rate-break markets prior to the first grain decision, 164 I. C. C. 619, under which the operators

at those markets used the average of balances as a maximum balance, while they at the same time had the benefit of actual transit balances where less. If the relief sought by appellants and denied by the Commission in 229 I. C. C. 9 and 231 I. C. C. 793 were granted, the dual system would immediately be restored and the Commission would have no power to control the unlawful conditions heretofore found existing under that system. The statement by the Commission that granting the relief sought would re-establish the dual system is amply supported by the testimony in both the first and second grain decisions, 164 I. C. C. 619 and 205 I. C. C. 301.

(e) Weight to Be Accorded Dissenting Opinions (P. 94)

The individual expressions of dissenting Commissioners referred to on pages 94 to 98, inclusive, of appellants' brief overlook the following testimony by *Witness K. K. Smith, assistant to the president of the Kimbell Milling Company, Fort Worth, Texas*, appearing on pages 1319 to 1323, inclusive, of the transcript of record in Docket 27,628:

> "It was possible under this dual system of rate application for operators at terminal rate points, more specifically Kansas City, to use their less favorable tonnage into Kansas City against a sale calling for proportional tonnage, whereas the higher paid in freight bills were applied against the sales to destinations where the balance out from Kansas City was materially lower than the proportional rate.
>
> "For example, on August 23, 1928, we bought a car of wheat, MP 33059, shipped from Kansas City on transit tonnage with three tonnage applications. The first application covered grain originating at Brownell, Kansas, with 20 cents paid into Kansas City and a balance out of 28 cents to Group 3 or a total through rate from Brownell to Texas Group 3, via Kansas City, of

48 cents per hundred weight. The proper rate would have been 57 cents. The Arnold, Kansas, portion had 20½ cents paid into Kansas City, 29½ cents balance out to Group 3, with a through rate of 50 cents or a proportional rate of 57½ cents, while Neola, Kansas, only showed 19½ cents into Kansas City, 26½ cents balance out, or a through rate of 46 cents to Group 3 Texas; the proportional rate would have (R. 1319) been 56½ cents.

"On February 15, 1927, we bought car RI 50750, also shipped from Kansas City on tonnage which originated at Kanopolis, Kansas, with 19 cents paid in to Kansas City, 29 cents balance out, or a through rate from Kanopolis to Group 3 Texas, via Kansas City, of 48 cents per hundred weight. In case of the car with tonnage behind it originating at Kanopolis, Kansas, the proportional rate would have been 19 cents into Kansas City and 37 cents beyond, or a through rate based on the Kansas City proportional adjustment of 56 cents. They in reality only paid 48 cents, or a saving of 8 cents per hundred weight.

"Thus you see a dealer operating at a market where the dual system of rates was in effect had the opportunity to shuffle his tonnage in such a way as to effect a tremendous profit or saving in freight. (R. 1320.)

"Prior to the 17,000 rates, we understand it was the custom, wherever possible, to deliver grain against futures with proportional tonnage on the outbound move, thereby permitting the deliverer of the grain to work off his least desirable tonnage and retain his good transit billing, with low (R. 1321) balance, if any, and oftentimes come in direct competition with the party taking delivery of the grain.

"In our operations at Kansas City we had occasion several years ago, to buy a round lot of milo maize just delivered Kansas City. When shipment was made from storage stock we were tendered Kansas City proportional tonnage. During the process of disposing of this stock of milo maize we found the operator from whom we bought the grain actually underselling us

at given destinations even though we used the same basis as Kansas City.

"He had kept back the favorable tonnage with balances out lower than the proportional rates, whereas we were forced to work on the Kansas City proportional rates. Thus it becomes possible for a dealer operating under a dual system of rates to make material savings when he pays a smaller balance out than the Kansas City proportional rate or, when it suits his convenience, to undersell a shipper who must operate under proportional rates. (R. 1322.)

* * * * *

"It is alarming to contemplate the arbitrary advantages that would be accorded the Kansas City market, and the mills situated there, as pointed out above, where they are accorded transit balances that result from selective application of billing and at the same time be insured by having the proportionals to always operate as the absolute maximum that they would have to pay." (R. 1323.)

The foregoing testimony of Witness Smith was not controverted, though counsel for the appellants herein vainly endeavored to break it down by cross examination. In the lower court the appellants attempted to dispose of this testimony by stating that all transit operators have the right to select the freight bill to be offered upon the reshipment of grain after transit and the fact that a Kansas City dealer could send Omaha grain to Chicago for 9½ cents per 100 pounds (16 cents less 6½ cents paid in) does not mean that he would have any advantage. *Witness Smith's testimony* does not go to that situation. He showed that Kansas City operators could, *and did*, ship grain from certain origins to Texas under the dual system of transit at rates substantially less than the published tariff rates available to other operators. See the following examples:

	Rates in Cents Per 100 Lbs.		
Origins	*Kansas City Paid*	*Tariff Rates*	*Advantage*
Brownell, Kan.	48	57	9
Arnold, Kan.	50	57½	7½
Neola, Kan.	46	56½	10½
Kanopolis, Kan.	48	56	8
Average Kansas City Advantage			9

The Interstate Commerce Commission heard many witnesses and listened to a great deal of evidence depicting the unjust and unreasonable preferences which the rate-break markets enjoyed under the dual system of rates.

(f) Lower Court's Assumption That There Are Two Transit Methods (P. 99)

The lower court was entirely correct in assuming that there are two methods of transit.

The usual method is to determine the transit balance by deducting the charge paid on the inbound commodity from the through rate on the commodity shipped from point of origin to final destination applicable via the transit point. That is the system which we have designated as the actual transit balance system.

There is another and a different system prescribed for application at rate-break markets, that system having been prescribed on application of those markets. Under that system the through rate applicable from origin to final destination is ignored in making individual transit applications. The rate from point of origin to transit point is also ignored except that it must represent a certain minimum

figure. In using that system the average transit balance fixed by the Commission is applied to each given destination, regardless of the origin of the tonnage and regardless of the through rate applicable.

They are two entirely different systems and the lower court was entirely correct in its assumption.

(g) Interior Points Transiting on Other Than Through Rates (P. 100)

The lower court was entirely correct in assuming that interior transit points transit only on through rates.

What the appellants refer to as "combinations" are not combinations in fact but they are through joint rates determined by the Commission as reasonable maximum rates, after which they are broken into factors to and from the appellant markets by ascertaining the aver_e of all outbound balances from a given market to a given destination and adding that fixed balance to the inbound rates in such manner as to equal the reasonable maximum through joint rates theretofore fixed by the Commission.

> "The rate-break combinations on the Missouri River markets from Kansas, Nebraska, and other western states to Chicago and St. Louis were the result of first checking in reasonable through rates from the origin key points to the final markets, over the direct routes through the Missouri River markets, and then breaking them back into inbound local rates to the latter markets and proportional rates beyond, on the basis of average relative mileages, resulting in proportional rates approximating the average transit balances that would have resulted if one-factor through rates with transit, in lieu of the rate-break combinations, had been prescribed." *Grain and Grain Products Within the Western District and for Export*, 205 I. C. C. 301, 328. (R. 305.)

So far as the appellant markets and competing interior markets are concerned they each have the benefit of through rates which have been found by the Commission to be reasonable maximum rates. Those rates have not been attacked by appellants.

(h) Dual System Entirely Abolished (P. 101)

The lower court was entirely correct in holding that the Commission found that it could not correct the unlawful conditions existing prior to the General Grain decisions without abolishing the dual system of transit, that is, the use of the transit balance system and the proportional transit system by the same market at the same time. The exception made in the application of rates for the purpose of permitting one carrier to meet the competition of the other did not continue or restore the dual system of transit. Permitting other than rate-back markets to transit on those rates did not continue or restore the dual system of transit because the points transiting on those rates used only one transit system, that is, the transit balance system.

The Commission did abolish the dual system of transit and the lower court was entirely correct in so holding.

(i) Commission Found Dual System Unduly Prejudicial to Other Markets (P. 102)

The opinion of the lower court (R. 740) quoted by appellants on page 102 of their brief, to the effect that the Commission found the availability of both methods of transit resulted in undue preference of rate-break markets over other transit points, is correct. In the second grain decision, 205 I. C. C. 301, the Commission cited numerous instances

where important markets other than rate-break markets were unduly prejudiced by the preferences available to operators at rate-break markets through the juggling of outbound balances by reason of the fact that they could use the proportional rate as a maximum or ceiling and apply lower actual balances where available.

"One of the advocates of strict observance of the rate-break combinations, without exception, is Hutchinson, Kans. Hutchinson is not a rate-break market, but is an important interior market in volume of grain handled. Its grain is bought on basis of the Kansas City price minus the freight rate to Kansas City, and its shipments to eastern markets are on the rate-break combinations on Kansas City and St. Louis. Hutchinson represents that prior to the establishment of the Part 7 adjustment, when a transit balance lower than the proportional rate was available to the Kansas City dealer in reshipping from Kansas City, and only the proportional rate beyond Kansas City was available to the Hutchinson dealer in shipping direct to the East through Kansas City, it did very little business in the East; that during the period of the Part 7 adjustment, when only the proportional rate was available both to the Kansas City dealer in reshipping from Kansas City and to the Hutchinson dealer in shipping direct through Kansas City, its business in the East substantially increased; and that since the restoration of the old adjustment its trade in the East has again declined." (336.) (R. 314-315.)

* * * * *

"One comparison is of the charges paid by dealers at Omaha and Hutchinson, respectively, on a car of high-protein wheat from Hutchinson through Kansas City and Omaha to Minneapolis. The Hutchinson dealer, shipping through to Minneapolis, would pay the flat rate to Kansas City plus a proportional rate of 15.5 cents thence to Minneapolis. The Omaha dealer would pay, in the first instance, the flat rate to Kansas City plus the proportional rate of 6 cents thence to Omaha. To Chicago the proportional rate was 15 cents

from both Omaha and Kansas City, and would apply on a shipment of low-protein wheat from a point in interior Nebraska to Chicago. By transiting at Omaha on the proportional rate from Kansas City to Chicago, the Omaha dealer would have available an inbound-transit credit of 6 cents, which could be used in connection with the outbound shipment from Omaha to Chicago at the transit balance of 9 cents of the proportional rate from Kansas City to Chicago, on the low-protein wheat from the interior point in Nebraska. This would have the effect of transferring the application of the proportional rate of 6 cents from Kansas City to Omaha from the Hutchinson car to the interior Nebraska car, *and of giving to the Omaha dealer free transportation from Kansas City to Omaha of the Hutchinson car. The final effect would be an advantage to the Omaha dealer over the Hutchinson dealer of the difference between the proportional rates from Kansas City and Omaha to Minneapolis, which was 4 cents.* In other words, the Omaha dealer, upon surrender of the freight bill on the car of low-protein wheat from Nebraska and shipping out, at the proportional rate of 11.5 cents, the high-protein wheat from Hutchinson, could sell the Hutchinson wheat at Minneapolis at a delivered price of (337) $1.115, or 4 cents lower than could the Hutchinson dealer, assuming a market price of $1 at both Omaha and Kansas City." (Emphasis supplied.) *Grain and Grain Products Within the Western District and for Export*, 205 I. C. C. 301, (337-338.) (R. 315-316.)

It is true, as stated by appellants, that the Commission did find that the users of transit balances at the primary markets under the dual system of transit had an undue preference over the users of proportional rates but the Commission further found that the operators at the primary or rate-break markets were unduly preferred by the dual system of rates and that the operators at other than rate-break markets were unduly prejudiced thereby. After citing the unlawful conditions existing under the dual sys-

tem of transit, the Commission concluded by the following statement:

> "The finding in the original report that the rate-break combinations must be the exclusive basis of charge on shipments through the rate-break markets, when stopped at those markets, is affirmed." (205 I. C. C. 342.) (R. 321.)

(j) Commission Found That Primary Markets Were Not Injured (P. 109)

Appellants criticize the holding of the lower court to the effect that the Commission found that no substantial injury to the primary markets had been shown by reason of the granting of transit under the transit balance system at interior points. The holding of the lower court in that respect is correct.

The Commission made the following findings:

> "It seems clear that the transit at points other than the rate-break market on the indirect route, resulting from the further modification of the findings in the *Grain case*, was at most merely an aggravation of a general competitive situation which had already foreshadowed these complaints, and that it afforded a welcome additional argument in the general cause rather than a sound basis for a claim of undue preference." *Grain and Grain Products Within the Western District and for Export*, 229 I. C. C. 9 (14). (R. 642.)
>
> • • • • •
>
> "We find that the present adjustment of rates on grain and grain products throughout the western district does not subject the rate-break markets on indirect routes to undue prejudice and disadvantage and give to points on the same or other routes an undue preference and advantage." *Grain and Grain Products Within the Western District and for Export*, 229 I. C. C. 9 (16). (R. 644.)

At page 110 of their brief, appellants argue that evidence of injury to the rate-break markets should not be required as the situation speaks for itself.

If there is any one principle which is settled and universally followed by the Commission and the courts in administering the Interstate Commerce Act, it is that there can be no violation of Section 3 without a showing of damage to the person or locality alleged to be prejudiced. The act does not condemn mere differences in rates. Neither does it condemn all discriminations or preferences. Before a discrimination or preference may be found to be unlawful, it must first be found to be "undue or unreasonable" and it cannot be undue or unreasonable unless it results in damage to the person, persons or localities claiming to be prejudiced or discriminated against.

> "There is here a clear discrimination in the rates charged for the movement of the same kind of traffic under similar transportation conditions. But to prove that this discrimination results in a violation of Section 3 it must be shown that complainant suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, regardless of the manner of its removal." *Duluth Chamber of Commerce v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 122 I. C. C. 739 (742).
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> "To be undue in violation of Section 3, preference and prejudice must result in injury to the prejudiced party."
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> "We find that the failure and refusal of defendants to establish a smelting-in-transit arrangement at East Helena on lead ore and concentrates from Kellogg and Bradley to eastern destinations, such as they have established from points in the Coeur d'Alene district served by the Northern Pacific, has not been shown to have resulted or to result in unjust discrimination or

undue prejudice." *Bunker Hill & Sullivan Mining & Concentrating Co. v. Northern Pacific Railway Company, et al.*, 129 I. C. C. 242 (246).

"On the other hand, defendant's showing that the rate level on aluminum is higher than on tin and copper does not relieve complainant of the burden of establishing the fact of undue prejudice and preference. We cannot conclude that it exists merely because the rates are different and there is some competition between the metals. There must be a further showing that the difference in rates has operated in some way to complainant's disadvantage in marketing aluminum. There is no such evidence here and we accordingly find that the ratings and rates assailed are not unduly prejudicial or preferential." *Aluminum Co. of America v. A. T. & S. F. Railway*, 146 I. C. C. 363 (372).

The system of transit in effect at rate-break markets is in the nature of a group adjustment. The Commission first determined reasonable maximum through joint rates and then broke them back so that the outbound proportional rates would represent the average of individual transit balances that would have resulted if one-factor through rates with transit had been prescribed and applied in the same manner as prescribed and applied generally throughout the territory. This average or group method of arriving at fixed transit balances was based on the plea of the markets for the prescription of constant balances or proportionals.

When the entire structure is considered as a whole this basis is more beneficial to the rate-break markets than the "actual balance" basis applicable at interior transit points but, like any group adjustment, tariff illustrations can be shown which, if considered alone, would indicate that the charges assessed and collected for certain services are ex-

cessive. If all of the stations situated within a circle circumscribed around St. Louis and Kansas City were placed in one group and the same rate were applied to and from all points in that group, such rate being based on a reasonable scale applied to the average distance to every station in the group, the charges to the stations on the near side of the group would exceed the charges based on the scale used as the basis for the rate to the group as a whole. Likewise, the charges to the stations on the far side of the group would be less than the charges based on the same scale. But it has been universally held by the Commission and the courts that the mere difference in the ton-mile earnings existing by reason of the rates to the near side stations being the same as the rates to the far side stations in the group is not unreasonable and unjust and, therefore, it is not unlawful.

The same principle applies in the case at bar. By combing the tariffs carefully, an expert rate man can locate cases which are illustrated by Plates I to V (R. 723-727) and pointed out by the appellants in their brief. If it were necessary for Kansas City to supply the St. Louis demand with San Antonio tonnage, and if it were necessary that they ship San Antonio tonnage to St. Louis only, the resulting difference in charges pointed out by appellants would not be unlawful because that is a mere incident of the general adjustment and the higher charge paid on the San Antonio tonnage when transited at Kansas City would be offset by the lower charge on tonnage transited at Kansas City and forwarded under the average balance where the competitive interior transit point would have to pay the actual balance higher than the average. That is an incident of all group adjustments.

However, in the grain business the rate-break markets, as a practical matter, are never compelled to use transit tonnage in such way as to result in their paying more than the interior transit point. Grain of given types and grades reaching Kansas City or any other rate-break market attains a common value. The identity of the grain is not preserved. Grain from Texas, from Oklahoma, from Montana, from Nebraska, from Kansas, and other producing points, is all commingled when it reaches the storage point. When Kansas City receives an order for grain to go to St. Louis or beyond, it is not necessary to apply tonnage originating at San Antonio. And when Kansas City has San Antonio tonnage on hand in storage, it is not necessary to forward that tonnage to St. Louis. Those markets can so operate their business as to avoid paying any through charges which exceed the charges available to interior transit points.

This explains the absence of testimony showing that the rate-break markets are damaged or injured by the present adjustment. In the absence of a showing of damage or injury, a finding of undue prejudice could not be sustained.

IV. CONCLUSION

In the original grain decision, 164 I. C. C. 619, the Commission found that the use of the dual system of transit at rate-break markets was unduly prejudicial to operators at other transit points, unduly preferential of operators at rate-break markets, and unduly discriminatory in favor of operators at the rate-break markets who had the largest available supply of outbound balances. That finding was supported by substantial evidence. In the second hearing further evidence was introduced showing the manner in

which transit operators at other than rate-break markets were injured by the use of the dual system at such rate-break markets. The Commission re-affirmed its previous finding. (205 I. C. C. 301.) The dual system was cancelled.

Appellants filed complaints seeking to have the dual system of transit restored. After adequate hearing, the Commission found that appellants had not shown that they were unduly damaged or injured by being limited to one system of transit. On appeal to the court the lower court held that the facts amply support the Commission's conclusions. We submit that the record shows that the lower court was correct in its findings and conclusions. We respectfully ask that the decision of the lower court be affirmed.

Respectfully submitted,

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Dated: November 5, 1941.

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